are read as meaning that the particulars of a purchase must be entered on the date upon which the purchase takes place, which they can be read as meaning without doing any violence to the phrase, then the words are not redundant as, read with paragraph (a), they mean that the particulars of the purchase must be entered on the date upon which the purchase takes place and those particulars must contain amongst other things the date of the purchase.

I think therefore that the Magistrate was wrong in holding as he did, and as on what I consider to be the correct interpretation the prosecution had made out a *prima facie* case, I allow the appeal and quash the order of acquittal and discharge and direct that the case be returned to the Magistrate for him to call upon the Respondent for his defence.

Appeal allowed.

Solicitors: *Allen & Gledhill.*

PONNUSAMY & ANOR. v. NATHU RAM

[O. C. J. (Good J.) May 13, 1959]

[Ipoh — Civil Suit No. 243 of 1956]

Practice and Procedure — Amendment of Statement of Defence — Leave — Application closely connected with unsuccessful attempt to introduce evidence — Principles to be considered.

Evidence Ordinance, 1950, ss.91 and 92 proviso (b) — Estoppel.

In dealing with an application to amend the pleadings the Court should consider the materiality and the effectiveness of the amendment, and it is a well-established practice not to allow an amendment where it appears that such an amendment would be useless. The Court should look at the probable consequences of the amendment, and if the amendment would be ineffectual then it ought not to be allowed to be made.

If a party is precluded from setting up a certain plea by reason of the fact that he is not permitted by the law of evidence to give evidence in support of it, he should not be permitted to include that plea in his pleadings.

Cases referred to:—

(1) *Lawrence* v. *Lord Norreys* (1888) 39 Ch. D. 213, 215.

(2) *Morel Bros. & Co. Ltd.* v. *The Earl of Westmoreland* [1903] 1 K.B. 77.

(3) *Wood* v. *The Earl of Durham* (1888) 21 Q.B.D. 501.

APPLICATION TO AMEND PLEADINGS.

B. K. Das for the plaintiffs.

N. Sharma for the defendant.

Good J. delivering oral ruling: An application has been made by Counsel for the defendant for leave to amend the Statement of Defence by the addition of the following paragraph:—

"R. M. N. Naina deceased represented to the Defendant and caused him to believe that the Memorandum of Transfer copy of which is annexed to the Plaint and marked 'P. 1' therein was to be taken by him only as a security and the Defendant acting upon such belief and representation signed the said Memorandum of Transfer. The said deceased throughout his life treated the said Memorandum only as a security and the Plaintiffs are estopped from denying that it was a security."

This application is in the nature of a tactical manoeuvre — I use the expression in no derogatory or critical sense — designed to rescue the defendant from the predicament into which he has fallen by reason of my ruling this morning on the admissibility of certain evidence. When I gave that ruling, I did not give my reasons for it. I said that they would be given later, and it is perhaps unfortunate that I did not reserve the ruling in the light of what has transpired since because it would be more convenient in dealing with the present application if my reasons for holding that evidence to be inadmissible were on record. However, I felt that as I had made up my mind on the point it was better that it should be decided and the decision announced there and then; but in fairness to the parties and to Counsel, who both went to a considerable amount of trouble to provide me with a fairly large number of authorities, I considered that in the event of a possible appeal it would be right that a written judgment, setting out and considering the authorities cited to me, should be made available.

Now, the present application is connected — and I think closely connected — with the unsuccessful attempt to introduce certain evidence as to the Memorandum of Transfer (Exhibit P. 1). The defendant's case in brief is, or the case which he seeks to make is, that things are not what they seem to be: that that document Exhibit P. 1 though expresed to be a transfer of land for consideration — in other words, a straightforward transaction of sale — is in fact a security for a loan. I ruled that he could not give oral evidence of any arrangement that he may have come to with the deceased, Naina, as to which the Memorandum of Transfer is silent and which, in my view, if allowed, would be inconsistent with the terms of the Memorandum itself. "Well," he says, "if I cannot get the evidence in in that way, I will try to get it in by another door." And he proposes to do that by amending his defence to include an averment of a representation which he alleges was made to him by the deceased when he signed the Memorandum of Transfer. In my view, the effect of that — if the amendment was allowed and evidence was given in support of the averment contained in it — would be to admit oral evidence of a separate oral agreement as to a matter on which the Memorandum of Transfer is silent and, in my view — also for the same reason which caused me to give my ruling this morning — I would regard such a representation as alleged as a separate oral agreement which is inconsistent with the terms of the Memorandum. Therefore it appears to me that that evidence is caught by section 91 of the Evidence Ordinance and is not rescued by proviso (b) to section 92. The second part of the proposed amendment to the effect that the plaintiffs are estopped from denying that the Memorandum of Transfer was

a security does not arise because, as Mr. Das for the plaintiffs pointed out — and I am in agreement with his submission — they cannot be estopped from denying something the existence of which the other side is not in a position to prove. The question of denial and of their being estopped from denying does not arise at all.

Mr. Sharma submitted, in urging that this amendment should be allowed, that the question of the admissibility of evidence in support of the amendment does not arise at this stage, and should be dealt with later when it does arise. His submission was that at this stage the only question before the Court is whether the amendment should be allowed or not, and he cited a number of cases in which it had been held that any disadvantage accruing to the other side by reason of an amendment to the pleadings can generally be cured by an order for costs. But there is an abundance of authority for the proposition that in dealing with an application to amend the pleadings the Court should consider the materiality and the effectiveness of the amendment, and it is a well-established practice not to allow an amendment where it appears that such an amendment would be useless.

Taking the first of those propositions, Bowen L.J. in the case of *Lawrence* v. *Lord Norreys*[1] says:

> "No court ought to refuse leave to make such amendments (that was with reference to a later amendment alleging fraud) if it saw any reasonable prospect, or, I may say, reasonable probability, that a case could be made of fraud which would defeat the statute — that there was any substance in the case, that it was not simply fiction and imagination."

That passage goes to show that the Court should look at the probable consequences of the amendment, and it would appear to follow that if the amendment would be ineffectual then it ought not to be allowed to be made. That principle was followed in the case of *Morel Brothers & Co., Limited* v. *The Earl of Westmoreland*[2] as appears from the judgment of the Master of the Rolls where he refused an application to amend the pleadings on the ground that the plaintiffs would fail even if the amendment were allowed. And in *Wood* v. *The Earl of Durham*[3] where the plaintiff was a professional jockey suing for damages for libel charging him with unfairly and dishonestly riding the horses in a particular stable, the defendant pleaded a justification and afterwards applied to amend his defence by adding a paragraph alleging that at the time of the publication the plaintiff was commonly reputed to have been in the habit of unfairly and dishonestly riding horses in races, so as to prevent them from winning. It was held that as general evidence of the plaintiff's bad reputation (if admissible) could only be given in reduction of damages, and not in answer to the action, the paragraph did not contain a statement of material facts on which the defendant relied for his defence, within the meaning of Order XIX., r. 4, or a ground of defence which must be raised under Order XIX., r. 15, but was a denial or defence as to damages claimed or their amount, within the meaning of Order XXI., r. 4, and therefore ought not to be pleaded, and leave to amend must be refused.

In the case to which I have just referred, *Morel Brothers & Co., Limited* v. *The Earl of Westmoreland, supra,* the *ratio decidendi* of the point whether the amendment of the pleadings should be allowed or not was that the Court would not allow the addition of a claim which the plaintiffs had precluded themselves from making and, as I see it, the position is precisely the same if a party is precluded from setting up a certain plea by reason of the fact that he is not permitted by the law of evidence to give evidence in support of it; he should not be permitted to include that plea in his pleadings. Since I have ruled that the Defendant is precluded from giving any evidence of any arrangement between himself and the deceased, Naina, in respect of the Memorandum of Transfer in this case, I must accordingly dismiss the application to amend the defence.

Application dismissed.

Solicitors: *Das & Co.; N. Sharma.*

GURCHARAN KAUR v. ROCHI SILK STORE

[C.A. (Thomson C.J., Rigby and Ong JJ.)
January 21, 1959]

[K. L. — F.M. Civil Appeal No. 38 of 1958]

Landlord and Tenant — Demolition of building for purposes of rebuilding — "Intention" of owner — Building plans approved by local authority — Building scheme in accordance with Municipal Council's development plan — Scheme in public interests — Control of Rent Ordinance, 1956, s.12(1)(m).

Appeal — "Points of fact" and "points of law" — Control of Rent Ordinance, 1956, s. 11(1).

The landlord in this case was granted a certificate for the purposes of section 12(1)(m) of the Control of Rent Ordinance to the effect that the Rent Assessment Board was satisfied that she intended to demolish the premises in question for the purposes of rebuilding and that in its opinion it was in the public interest that she should be permitted to do so. The tenants appealed to the High Court against that decision of the Board and the appeal was allowed. The learned Judge in the course of his decision said that he thought he "ought to decide whether upon the record there was sufficient evidence" to justify the Board in concluding that such an intention was made out and concluded that "upon the facts of the present case as recorded and as deduced from the evidence I consider that this appeal must be allowed." On his own consideration of the evidence the learned Judge came to the conclusion that no intention of the necessary quality was made out. The landlord appealed to the Court of Appeal and her ground of appeal was that the original appeal to the High Court was on points of fact and not on any piont of law and therefore was one which the High Court was not competent to entertain by reason of section 11 of the Ordinance which only gives right of appeal on a point of law.

Held: (1) under section 11(1) of the Ordinance no appeal lies which is an appeal on a question of fact. In this case there was nothing on the face of what the Board had said in their certificate or in their grounds of judgment to show that they took an erroneous view of the law. Therefore the appeal to the High Court was